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OF COPYRIGHT

Before the
COPYRIGHT ARBITRATION ROYALTY PANELS
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In the Matter of)	
)	
Adjustment of the Rates for)	Docket No. 96-6
Noncommercial Educational)	CARP NCBRA
Broadcasting Compulsory License)	

**REPLY OF PUBLIC BROADCASTERS
IN SUPPORT OF MOTION TO BIFURCATE**

ORIGINAL

Preliminary Statement

The Public Broadcasters' Motion to Bifurcate these proceedings is founded on a simple premise: that the most rational way to arrive at the rates to which ASCAP and BMI are entitled for the 1998-2002 period is first to determine the value of all of the ASCAP and BMI music performed by the entities at issue, and second to determine what portion of that sum is properly claimed by each of ASCAP and BMI. The opposition papers filed by ASCAP and BMI assiduously avoid addressing the logic of this approach, which is unassailable; they instead argue that such a two-phase proceeding would necessarily be inefficient and duplicative, a matter we address in the Argument section below.

ASCAP and BMI's opposition papers tellingly concede that only the Public Broadcasters have presented data to the CARP on public radio and television's overall

use of ASCAP and BMI music, and the changes which have occurred in such use since the last license negotiations. See, e.g., ASCAP Opposition at 3-4. Having chosen, for tactical reasons, to ignore such obviously relevant data in their own direct cases, ASCAP and BMI now contend that they would be unduly prejudiced were Phase I of this proceeding to focus on an examination of this issue (and its fee-adjustment implications). In exercising the discretion plainly afforded it under § 801(c) of the Act to make such procedural rules as will enhance the decisionmaking process of the CARP, the Copyright Office and Librarian should, however, give little weight to "prejudice" claims resulting from the knowing, strategic choice by ASCAP and BMI not to confront this issue in presenting their affirmative cases.

Underlying the ASCAP and BMI strategic choice is a reality from which they cannot escape: that examination of changes in overall music use by public radio and television broadcasters between the last license term and the present could not possibly support the adjusted fee levels each of ASCAP and BMI is requesting here. (The Public Broadcasters' unanswered data show virtually no change in overall music use over this period.) How, then, can ASCAP and BMI justify what, in combination, amounts to a request for a more than 300 percent increase in music license fees? The answer, if

you are BMI, is to assert that your share of overall music use has increased (see Testimony of Fredric J. Willms at 21-22); if you are ASCAP, you ignore what has occurred to your "market share" and attempt to bury any reference to your own prior license agreements. See ASCAP Motion to Strike Certain Portions of the Public Broadcasters' Direct Case Relating to the Collective Fee Stated at 9-14.¹

In truth, ASCAP and BMI seek their own form of bifurcated proceeding, one phase in which the CARP would set a fee for ASCAP, based solely on criteria ASCAP believes most relevant, and a second which sets a fee for BMI, based on the different criteria BMI believes most relevant. Such a proceeding, by treating each of ASCAP and BMI in a vacuum, inevitably would lose sight of the ultimate objective of this CARP: to arrive at fair and just overall music license fees for the Public Broadcasters.

1. BMI, which has not objected per se to the Public Broadcasters' offer of a collective fee as the basis of their CARP proposal, properly adds its own objection to ASCAP's effort to expunge its own prior license agreements from the record of this proceeding. See BMI Opposition at 2 n.1.

Argument

We briefly address ASCAP's and BMI's principal remaining arguments in opposition to bifurcation:

A. Asserted Lack of Legal Basis. The opposition papers raise no arguments based on the language of § 118 and its legislative history beyond those already responded to in the Public Broadcaster's Response to ASCAP's Objection to the Public Broadcasters' Request for Bifurcated Proceedings and Motion To Strike Certain Portions of the Public Broadcasters' Direct Case Relating to the Collective Fee Stated at 1-11. We respectfully refer the Copyright Office to that response.

B. Asserted Untimeliness of Motion. ASCAP suggests that the Public Broadcasters improperly waited "until the very last day" to move for bifurcation. See ASCAP Opposition at 4. We respond by noting simply that all motions directed to procedural and evidentiary matters -- including ASCAP's -- were filed on "the very last day," November 14th, as prescribed by the schedule governing these proceedings. ASCAP is no more prejudiced by the timing of the Motion To Bifurcate than are the Public Broadcasters by the timing of ASCAP's various motions to strike -- e.g., its motion to strike the Public Broadcasters' collective fee

request.² It is absurd to suggest that ASCAP and BMI could be prejudiced as a result of the Public Broadcasters' compliance with the Copyright Office schedule.

C. Asserted Inefficiency of a Bifurcated Proceeding. ASCAP and BMI maintain that, under the proposed bifurcated procedure, everything would have to be done twice. This is a gross exaggeration. The issue is not the simplistic one of whether one or more of ASCAP's and BMI's witnesses will need to testify twice; the issue is whether they will need to testify twice as to the same issues -- and there is utterly no basis for believing that this will be the case. For example, the direct cases of the parties show that there are likely to be varying approaches proposed by the respective parties concerning the proper methodology for assessing the overall nature of music use by the Public Broadcasters and measuring changes in that use over the relevant time period. This is, however, a matter which will need to be adjudicated once, not twice (as ASCAP and BMI suggest).

2. ASCAP's reference to the March 1997 CARP Order in the Satellite Carrier rate adjustment proceeding is inapposite. The relief there sought by ASkyB was for evidentiary preclusion under 37 C.F.R. § 251.47(e); was lodged well after the period prescribed for motions directed to the Copyright Office; and took the form of a "motion in limine" directed to the CARP itself on the eve of the commencement of hearings.

There would, in fact, be significant efficiencies derived from a bifurcated proceeding. For example, in relation to music use evidence, Phase I of the CARP need only determine the Public Broadcasters' overall use of ASCAP and BMI music (appropriately measured) and changes in that use over time. It need not consider -- whether program-by-program, radio vs. television, year-to-year, or on any other basis ASCAP or BMI might view as relevant -- which of the thousands of copyrighted musical compositions involved appears in which of ASCAP's or BMI's constantly changing repertoires. It also need not consider the "relative value" of the competing repertoires with respect to such factors as numbers of artists or Grammy award winners. The sorting through of these types of issues can be -- and is likely to be -- complex and contentious, given the fierce rivalry between the two organizations to attract and retain composers. It is logical and fair for ASCAP and BMI to resolve these issues in a focussed "Phase II" proceeding (as opposed to the type of disorganized and piecemeal approach that would result from a single proceeding).

The case of Joseph Raposo is a telling example in support of the logic and fairness of a bifurcated approach. In its direct case, BMI suggests that its entitlement to vastly increased fees is based, in part, on the fact that

BMI was successful over the last license term in luring the right to license works in the estate of Joseph Raposo, a composer of much Sesame Street music, away from ASCAP. See Testimony of Fredric J. Willms at 22. Since it is not in its interest to do so, ASCAP neither references this fact nor proposes any downward adjustment in its requested fee to account for the loss of Mr. Raposo. As a result, the Public Broadcasters are caught inexorably in the middle of a battle between ASCAP and BMI over the relative "importance" of their repertories, a battle where "gains" by one organization are not recognized as "losses" by the other, and where the end result is the proposal of differing methodologies designed to mask the very fluidity of the repertories and the inconsequence to the Public Broadcasters whether, e.g., Mr. Raposo's music is, at any given time, affiliated with ASCAP or BMI.³

These and a myriad of other "market share" issues are irrelevant to a Phase I, and would only need to be sorted out in a Phase II. From an efficiency perspective, leaving such issues to a Phase II offers at least two

3. ASCAP's suggestion that the Public Broadcasters already have music share data (see ASCAP Opposition at 4-5) cannot seriously be read as suggesting that either ASCAP or BMI will defer to such data. ASCAP already is sharpening its sword in relation to the Public Broadcasters' allegedly "fatally" deficient music use data base. Id. at 3.

significant advantages: first, the Public Broadcasters will be spared the elemental battle between ASCAP and BMI over these issues; second, where such divide-the-music-pie issues have presented themselves heretofore, e.g., following Phase I dispositions under § 111 of the Act, far oftener than not, ASCAP and BMI (as well as SESAC) have worked things out without need for further arbitral or court intervention. A two-phase proceeding here thus offers the possibility of a more circumscribed hearing process than a unified proceeding in which all issues are inextricably intertwined.

D. Asserted Lack of Time To Complete a Bifurcated Proceeding. We have already addressed this stated concern in our moving papers. Other than conclusorily saying, "It can't be done" in the time allotted for completion of this CARP proceeding, ASCAP and BMI fail to demonstrate why. For the reasons discussed, total hearing time should be no longer, and may be shorter, than in a unitary hearing. ASCAP and BMI are each represented by large, capable law firms. Where, as here, compelling reasons of logic, fairness and efficiency all favor bifurcation, the fact that

the parties and the CARP will need to act with expedition
forms no basis for denying the bifurcation motion.

Respectfully submitted,



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Date: December 2, 1997

Before the
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CERTIFICATE OF SERVICE

I am an associate at Weil, Gotshal & Manges
LLP. I caused to be served on December 5, 1997 true
copies of the substitute Reply of Public Broadcasters
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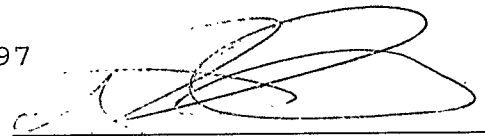
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December 4, 1997

BY HAND

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Re: In the Matter of Adjustment of the Rates for
Non-commercial Educational Broadcasting
Compulsory License, Docket No. 96-6 (CARP
NCBRA)

To Whom It May Concern:

We are submitting herewith a substitute Reply of
Public Broadcasters Motion to Bifurcate (and five copies) to
correct typographical errors appearing on pages 3, 4 and 7
of our original submission.

We apologize for any inconvenience.

Respectfully submitted,


R. Bruce Rich

Counsel to the Public
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Enclosures
RBR:hf

cc: Counsel of Record